Speech delivered by Ed. Graham Haywood ... on the 6th and 7th of December, 1858, in the House of Commons ... 1859

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OF

WAKE COUNTY,

On the 6th and 7th December, 1858,

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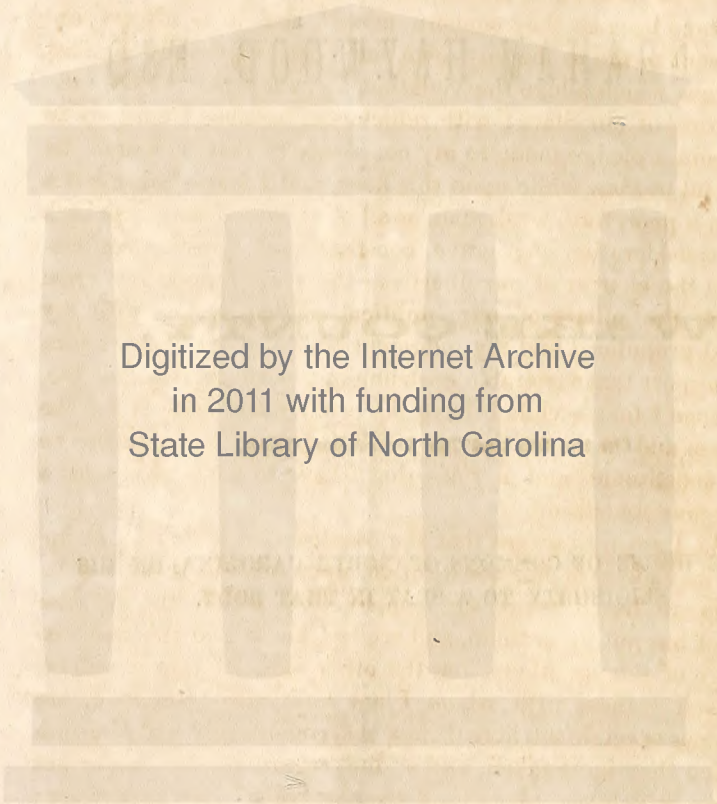

SPEECH.

Mr. Speaker: I approach the consideration of the resolutions now before this House with great reluctance—with reluctance because they concern myself, and it is always unpleasant to me to be my own advocate, especially against charges which allege the violation, upon my part, of the constitution of our State; with reluctance, because I am here to redeem a pledge made to my constituency that I would be faithful to *them* while upon this floor, and I fear—being but a man, a poor, frail, weak man, as all of us are—I may approach the consideration of a grave, constitutional question contained in the charter of our liberties—the very foundation upon which the pillars of our political edifice rest—with my mind prejudiced and my judgment biased, when I have sworn to support that venerable instrument; with reluctance, too, because I fear—while I have the profoundest respect for the House and feel sure that they will endeavor to do justice to my constituents and myself—that I have to contend against a foregone conclusion.

Sir, I am well aware that the construction which I put upon the clauses of our constitution, upon which these resolutions are based, is not the construction which the popular mind has put upon them, and while I know that the vast majority of the members, on the other side of this chamber, as well as those with whom I am politically associated, are anxious to retain me here if they can, consistently with the oath which they have taken, and a due regard to the important duties which, as judges, they are now called upon to perform; yet, sir, I well know that there are men in this chamber, and men out of this chamber, who would weep over my departure—if it be your pleasure to vacate my seat—"with the charming sincerity and touching pathos of benevolent crocodiles,"

while there is still another and smaller class who would rejoice, at what they will consider my mortification and defeat, with open and unbounded exultation. As to the last two classes they are entitled to my compassion and contempt, and most richly are they rewarded with them both.

But opinions have been expressed, even out of this chamber, which have been intended to affect the action of this body; and opinions expressed by members of the House before a hearing and before investigation, unfavorable to my claims, have already reached my ears. According to such, perfect honesty of intention, have I not good reason to fear, that pride of opinion, formed and expressed, which a short experience has taught me, is as fatal to a fair and candid investigation as wilful corruption and dishonesty? Even a criminal at the bar, has a right to unprejudiced judges, and as each juror is called to the book, it is a good cause of challenge, if he has formed or expressed an opinion against the unfortunate victim of his country's justice; but *I* have to-day no such privilege, where the Commoners of North Carolina are both judges and jurors, sitting in a court from whose judgment there is no appeal.

I ask then that this House will put away any hastily formed opinion, and give to such feeble argument as I can frame, a fair and just and candid consideration; for, Mr. Speaker, till the decision of this House be known, I stand here a peer among my peers, claiming for myself the same rights that attach to the proudest representative of the proudest county that I now look round upon; and holding that position, I call upon gentlemen to remember that if they wrongfully exclude me from my seat, *they* are more deeply wounding our constitution than *I* by wrongfully retaining it: that if they wilfully, or carelessly, or inadvertently decide awrong, then do they wilfully, or carelessly, or inadvertently violate that solemn oath which they have so lately taken in the face of God and this House when they put their hands upon the Holy Evangelists of Almighty God and swore to support the constitution of North Carolina.

Let me assure this House, that I have no feelings in this

matter which can induce me to desire a seat on this floor merely for the honor it confers; that I shall feel no sense of mortification or of defeat, whatever your decision may be. The honor of an election by the people of Wake county has already been conferred, it is one which I highly appreciate and fondly cherish. *It* is an evidence of the confidence, the esteem, the affection and respect of the people among whom I have always lived, which is rooted in my "heart's core, aye, in my heart of hearts;" to remain here can add nothing to the satisfaction which has already been enjoyed, and I shall endeavor, Mr. Speaker, to conduct this discussion as the discussion of a great constitutional question ought to be conducted, calmly and without feeling.

But, sir, let me call your attention to the manner in which this investigation has proceeded from its initiation. A few days after the organization of this body, the gentleman from Stanly, introduced a resolution, directing the Committee on Privileges and Elections to inquire and report whether a Clerk and Master in Equity was entitled to hold a seat upon this floor. *This* was directed at me *alone*, but on the next day a more general inquiry was instituted, involving the rights of several other Commoners now occupying seats on this floor, as to whose qualifications, (with one single exception) there could be no doubt, but still I am put at the head and front of the offenders, and the Committee on Privileges and Elections, is directed to inquire "whether E. G. Haywood, a member of the House of Commons from Wake county, is not now and was not at the time of *his* election a Clerk and Master in Equity for said county, and if so whether he is entitled to a seat in this House;" this resolution was also introduced by the Commoner from Stanly, and was immediately referred to the proposed Committee.

Now sir, it has not been my good fortune heretofore to have known that gentleman, nor am I aware that he has so far identified himself with any important matter of State policy, or so intimately connected himself with any subject of paramount legislative importance, as to have made it generally known that he has ever before been a member of this body;

but I have been informed that it is not the first time that gentleman has occupied a seat in this Hall. Pray sir, will the gentleman assert, will any member present, who has before occupied his present position assert in the face of this body, that he has never sat upon this floor with members, who must have been disqualified under the last clause in the amended Constitution, if I am now disqualified under said clause? Will that gentleman deny that he was informed and as officially informed as in the case now before us of the existence of such disqualification, if disqualification it be? I trow not sir. Will the gentleman even assert, that he does not know, there are other members of this body, before me, behind me, and on either side, even now, whose rights might well be called in question, if the right of my constituency to send me here can be questioned? I mean no personal disrespect to the member from Stanly. I do not regard *him* as the originator of this singular selection of myself, as the person at whose expense, an example must be made, to vindicate the integrity of the Constitution; but pray sir, what does it mean? What has so stirred him up to this sudden flood of mutiny, in behalf of a wounded and outraged fundamental law? What is it, that has so roused the tender sensibilities of other gentlemen, many of whom have occupied seats on this floor more than once, since the amendments of our Constitution in 1835–'6, without thinking it necessary heretofore to raise and decide the questions, involved in the resolutions now before the House; is it not well known, Mr. Speaker, that not a single session of this General Assembly has been held, except it contained among its members not one, but many holding such offices as Postmaster, County-Attorney, Trustee of the University, State Directors in various Railroads, heads of corporations, public and private, and many others of a like nature which I might enumerate? Why then this sudden zeal in behalf of the Constitution which has been so constantly and ruthlessly violated, of which my constituency through me are to be made the victims, without previous notice on the part of this House?

But sir, this interesting episode, in our legislative action

does not end here: A few days ago, after the last reference to the Committee on Privileges and Elections, a resolution was introduced by the gentleman from Wayne, which passed this House. It took from the consideration of the said committee the *law* of the various cases of contested seats then before them, and directed them to report the *facts* of each case only back to this body—a resolution which, as the gentleman from Tyrrell (who is now acting as its Chairman) yesterday declared upon this floor, "completely emasculated" his Committee. Yet that gentleman, as Chairman of that Committee, immediately upon introducing his report, conceives it to be his duty to introduce the resolutions now under consideration, by which my seat is declared "vacant," not extending to me even the poor privilege of resigning my seat, if I saw fit, upon a declaration of the opinion of the House against my claims. Sir, it was a discourtesy which I do not believe was intended by the gentleman from Tyrrell; my associations with him have heretofore been friendly; so far as I am informed they will continue so, and I beg leave to disavow, here, any reference to that gentleman in the general charges which I have made, and may hereafter make, in the course of these remarks. I believe he is actuated in what he has done and in what he will do, by a sense of duty. *I* think he has mistaken that duty.

But on the night before these resolutions were first heard in this House, I was informed by an intimate, personal friend, that a project was on foot to spring them upon me, and deprive me even of a fair appeal to the judgment of my peers. Sir, I acquit the gentleman of any connection wth this movement. Yet, sir, on the next morning, without previous warning, the acting Chairman of the Committee on Privileges and Elections did introduce these very resolutions now before the House, and you, Mr. Speaker, were announcing the question to the House, after the reading of the resolutions, and immediately previous to the taking of the vote, when I did rise, with natural indignation and surprise, to claim in common justice from this body, that a day might be fixed when my views might be laid before this House, in consequence of which

demand, it is that the matter is now up for consideration.—Sir, what does this history mean?

Mr. Speaker, look again at the *framing* of these resolutions. Were they framed with the purpose of entrapping me? Is this a question of entrapping, or being entrapped? The preamble declares that, "whereas, the 30th section of the constitution declares that no Clerk of a Court of Record can hold a seat in the General Assembly,"

"And whereas, the 4th section of the 4th article of the amended constitution declares that no person who holds any office or place of trust or profit under this State shall be eligible to a seat in either House of the General Assembly,

Resolved, That E. G. Haywood, a sitting member of the House from Wake Co. is constitutionally disqualified," &c.

Sir, is it not apparent, that a majority of the members here may agree with *me*, that a Court of Equity is not a Court of Record, within the meaning of the constitution, and that a majority may also agree with *me* that the office of Clerk and Master in Equity is not an office under the State of North-Carolina, within the meaning of the amended constitution, and yet this House may decide that I am not entitled to my seat?

It is like charging a man with burglary and murder in the same indictment; one-half of the jury may believe him innocent of the burglary, one-half may believe him innocent of the murder, and yet their verdict must be fatal.

Is this the mode in which the great body of Commoners for North-Carolina try the rights of fellow Commoners? Is this the mode in which our General Assembly is to make precedents for the purpose of ascertaining the meaning of our organic law? Sir, I for one must protest against it, what my fate may be is of little importance, when compared with the evils which may result from this precedent, to be looked to hereafter through all future ages. Who upon examining the history of this transaction can say whether a Clerk and Master in Equity is excluded from this House becausc he is a Clerk of a court of record, or because he is an officer under the State of North-Carolina? In all fairness *to me*, the question

should be taken separately as to my right under each clause, but in justice to themselves, and to the future most of all, it behooves this House to pursue that course.

Sir, I ask again what does this extraordinary mode of inquiry *mean?* I shall not attempt to answer, but to you sir, and to this House I say, *all* these be the facts, *look ye to their meaning.*

And now sir, I come to the investigation of our Constitution; I will vie with the gentlemen who are most zealous in endeavoring to ascertain its true intent and meaning. Are they strict constructionists? So am I. Are they lovers of that instrument? So am I. Do they urge the necessity of observing its smaller and less important provisions, as well as its great organic principles? Sir, I claim for myself the same position; nay more, I assert, that it is a fundamental doctrine of our Republican American Governments that a written Constitution, strictly construed and rigidly observed is *essential* to the perpetuation of our free institutions; the necessity for it grows out of the admission, that "the people are soverign," a substratum which underlies even our fundamental laws. For sir, we have said away with Governments founded upon the divine right of Kings, away with that still more pernicious, because more plausible doctrine which originates Government in a contract between the rulers and ruled. *He* who controls the destinies of nations, *alone*, is the source of all Government; for what shall we call "the state of nature," but the state in which men have even been found, "the state of society," and how is society capable of existing without government, and who has given man that complex nature which is the last visible cause of both these results but God himself. Sir, it is folly in us to attempt to found governments upon the *false* principles of *selfishness alone*, and a state of warfare between all our species, when *facts* establish that if our race is a selfish, it is also a social one, that our beneficent Father has not put us into this world with our hand against every man, and every man's hand against us, but delivers us into the hands of a *society regulated by the dictates of wisdom and justice*, of a society, which gives alms to the indigent, defence to the weak, instruc-

tion to the ignorant, consolation to the desparing, support to the helpless, nurture to the aged, faith to the doubtful, and *charity* to the whole human raee; which diffuses its beneficent exertions from acts of tenderness to the infant where he first cries in his cradle, to aets of comfort and preparation to the dying man on his way to the tomb." Since *He* has seen fit to found all government by means of soeiety, the necessary result of our nature, *we* have conceived that *that* nature may best regulate the practieal political details of government. Not from our faith in man, but from faith in God, and that rule of right which *He* has written in every human heart; striving only to educate the moral sense, and clear the mental vision that our citizens may see that rule of right. But sir, since we have selfish feelings as well as social affections, and the former predominate over the latter, to protect the minority from the tyranny of the majority, written Constitutions must be used, fixed and definite, not easily changed, and by their very operation in the ordinary conduct of affairs, correcting the evil tendencies of human natnre. Sir, I respect—I even venerate the instruments which are framed to effeet these ends; as a general rule they are the results of the patriotie counsels of the aggregate wisdom of the State, in the age in whieh they are framed. Still sir, I lay down this first principle of my argument—that constitntions should be most rigidly eonstrued–they are grants of powers from the sovereign, in whom they inhered,they are checks put upon the sovereignty of the people, by themselves; in this instance, both the elauses under eonsideration, deprive the free people of Wake eounty of the right of choosing any man they *please* as their representative here, so far as the restrictions of these elauses extend.

And again, Mr. Speaker, those provisions should be espeeially construed with strictness, which deprive or are alleged to deprive, a free citizen of a right which is inherent in him as a citizen, and which is extended to all other citizens of the State. The right, sir, to hold offices or places of trust or profit, if elected to them, the capaeity for receiving political honors, is one of our greatest privileges; for, sir,

"Who brands me on the forehead, breaks my sword,
"Or lays the bloody scourge upon my back,
"Wrongs me not half so much, as he who shuts
"The gates of honor on me—keeping out
"The Roman from his birth-right."

But although this general principle must be admitted, I do not know that it is essential to the support of the opinions which I hold.

The first clause under which it is attempted to eject me from my seat, is contained in the 30th section of our old constitution, ratified on the 18th day of December, 1776, and reads thus:

"That no Secretary of State, Attorney General or Clerk of any Court of Record, shall have a seat in the Senate, House of Commons, or Council of State."

Now it is essential for those who include a Clerk and Master in Equity in this clause, to establish,—

1st. That a Clerk and Master is a *Clerk.*

2d. That a Court of Equity is a *Court of Record.*

Sir, I deny both propositions. It will not do for gentlemen to say a Clerk and Master, is a Clerk, and something more. The office of a clerk in chancery, and a master in chancery, were, in old times in England, (from whence the names are derived) separate and distinct things; in our own country, when the constitution was framed in 1776, they were known so far as known in this country, as separate and distinct offices. At the time this article was framed, no such office was known as a Clerk and Master, for the office was created in this State long after the formation of the constitution in '76, by an act of 1787, chap. 278, sec. 3, that office is a sort of "*tertium quid,*" componnded of the old clerkship and mastership. Can any reasonable man suppose that the framers of the constitution intended to include within its provisions an officer of a character then totally unknown? Can any just mind conclude that they intended to include *him* under a name, the signification of which was then well known; when such officer, subsequently created, differs, in many essential particulars, from the officer named in the constitution; in the charac-

ter and nature of his duties, as well as in the very title which is bestowed upon him, when the new officer is created by statute?

Sir, I appeal to lawyers to know if under a statute inflicting a penalty upon a clerk, they, for one moment, suppose they could enforce such penalty against a Clerk and Master? If they think that under a statute making certain actions upon the parts of clerks of courts indictable, an indictment could be sustained against a Clerk and Master for these same acts? If an indictment against a Clerk and Master for a misdemeanor, would be sufficient, which charged simply that he was a clerk? If, sir, such penalty could be enforced, if such indictments could be sustained, why the frequent, the incessant tautology in our statute book in all penal statutes relating to such officers? Why, when pains are inflicted upon Clerks of County and Superior Courts, is a clause immediately added, (I believe in every instance) inflicting the same penalty upon the Clerk and Master of a Court of Equity? Search our code, examine our frequent revisals, investigate our statutes, and by them let me stand or fall.

But, Mr. Speaker, suppose a Clerk is identieal with a Clerk and Master; and suppose, for the sake of argument, that Courts of Equity in North Carolina are *now* "courts of record," yet, sir, it must still be established that they are "courts of record" within the meaning of the constitution of 1776.

"Court of record," is a technical term; it had a signification attached to it by the framers of our fundamental law. In construing that instrument we must give such terms the *same* meaning. Admit (which I deny to be true) that in 1782, when our court of equity was first founded, it was by statute declared to be a court of record; admit that it continued such by our "Revised Statutes" and "Revised Code," yet, sir, the constitution cannot be altered by legislative enactment in the ordinary mode; no member of this House, no person acquainted with the first rudiments of the principles of our constitutional governments will contend that it can.

There is a clause in our constitution which requires voters for members of our General Assembly to be twenty-one years

of age; there is another which requires the Governor of our State to be at least thirty years of age; now, sir, suppose our Legislature should meet and pass an act declaring that hereafter thirty days shall be deemed and held to be one year in this State. The General Assembly have the power to pass such an act, and such would be the meaning of the word *year*, in this State; but will any gentleman upon this floor contend, that by that means the constitution was so altered, that we could elect a Governor but thirty months of age, or that persons could vote for members of the General Assembly who numbered but twenty-one short months?

Again, our constitution now requires each member of the House of Commons "to possess in the county which he represents, not less than one hundred acres of land in fee." Suppose our Legislature should pass an act declaring that one inch square shall be deemed and held to be an acre in North Carolina. It would be the law of the land, but surely, surely, none will contend that by such enactment the landed qualification of members of the House of Commons, in our constitution, would be changed to one hundred square inches.

Again: such member is required to "possess" such land "in *fee*," which according to the meaning attached to the words then and now, meant and means—absolutely to him and his heirs forever. Suppose our Legislature should declare that an "*estate in fee*" shall be deemed and held to mean an estate for life or for twenty years, would the constitutional landed qualification of the members of the House of Commons be thereby altered in respect to the quantity of his estate?

Sir, it is but a few years, since every elector, of a member of our State Senate was, by the constitution, required to have and possess, within his senatorial district, a freehold of fifty acres of land. Now it is changed. If, sir, by this simple legislative legerdemain, our constitution could have been amended, tell me, sir, why it was that this State was agitated from its circumference to its centre to effect that change; tell me, why it was that a bill was first passed by three-fifths of both houses of the General Assembly, then published six months

before the next election of members of the General Assembly, then passedby two-thirds of the whole representation in each branch of the General Assembly, and finally submitted to all the qualified voters for members of the House of Commons, for their approval?

Sir, the doctrine that the Legislature can make words in our constitution include a class not included within them at the time of its formation, is monstrous. It is true, the Legislature might subsequently to the formation of the constitution create courts of record and give them all the *essential qualities* which, at that time, *inhered* in and made up the definition of, a court of record, and the clerk of such a court would be included in the clause of the constitution we are now discussing. But the merely giving to a court the *name* of a "court of record," when it has not such *essential qualities*, cannot make our court of equity a court of record, within the meaning of the 30th section of our constitution of 1776.

Sir, I propose to show what was understood by a Court of Record in 1776, and that a Court of Equity was not then a Court of Record; and further, that our present Court of Equity does not *now* come within the definition of what was *then* regarded as a Court of Record, even if it has been made such a Court, by statute, since 1776.

To explain clearly what a Court of Equity is, will render it necessary, as many of our Commoners are laymen, to refer back to the origin of these Courts in that country from whence our laws and forms of proceedings in courts are derived.

By the original system of English jurisprudence, as explained by Lord Chief Justice Hale, the whole judicial athority of the crown was exercised by the King in person, sitting in his Royal Court, called the Aula or Curia Regis. Portions of this authority were afterwards delegated to the Courts of Law, and where an injury had been committed, which the authority of those courts was adequate to redress, a writ under the great seal was issued by the Chancellor, out of the Chancery, called an "original writ," directed to the Sheriff of the county where the injury was alleged to have been committed, containing a short statement of the cause of complaint, and re-

quiring him to bring the wrongdoer before the proper Court of Law, there to answer the Plaintiff's charge. The framing and issuing of these writs, was the chief business of the "*ordinary jurisdiction*" of the Court of Chancery, and to that extent, it, as well as the Courts of Law, above referred to were clearly always regarded as "Courts of Record," and proceeded according to the Common Law of England, a system always popular in that country, which grew out of the necessities of a brave and manly people, and forms the basis of all our jurisprudence of this State, and in most of the States of this Union.

But there were certain cases which arose, where the remedy at Common Law was imperfect, and no effectual relief could be afforded in the Common Law Courts. The sovereign claimed as a branch of his prerogative, the right to decide in such cases, and this branch of the prerogative naturally fell into the hands of the Lord Chancellor, in whose custody the great seal was placed, and to whom was intrusted the keeping of the King's conscience. He was usually an *ecclesiastic*, and in administering this relief, he proceeded according to the course of the Cannon or the Civil law, derived from Rome, and always the cause of complaint when used and exercised in England. At first, this jurisdiction was more like an arbitration by a spiritual adviser, when one or both of the parties were unable to proceed in the Common Law Courts, or Courts of Record, on account of poverty, sickness or other cause; but gradually, a compulsory process was adopted, to compel the attendance of parties, which was a writ issuing under the great seal, called the "writ of subpœna." This writ was directed to the *defendant*, commanding him, "*under a penalty*," personally to appear before the Chancellor, to answer such things as were alleged against him, on "*oath*," and to abide by the Chancellor's decree.

The issuing of these subpœnas, and the decision of causes which arose under them, constituted the Chancellor's "extraordinary jurisdiction," and hence arose the "Court of Equity in Chancery." From these small beginnings have flowed all the doctrines of this Court of Equity, now the most important jurisdiction in England.

But at first it was most unpopular; for the Chancellor to sit in this Court was conceived to be an assumption of authority by him; for any man to be compelled to answer *upon oath* in his own cause was said to be contrary to the spirit and letter of the British constitution. The doctrines promulgated in the chancery were mostly derived from the Roman law, and in it there was no trial by jury. Accordingly the people and the jurists of the mother country confined the powers and character of this court, within the narrowest limits, and would never allow, by any decision, that it was a "court of record."

In A. D. 1389, the Commons petitioned "that no man might be brought before the Chancellor or the King's Council for matters remedial at the common law." Four years afterwards a second petition was presented to the same effect. In the first year of Henry IV, (A. D. 1399,) a similar petition was presented to the new king; and in the fourth year of the same prince the Commons again made this usual complaint, alleging "that no man ought to be imprisoned or put out of the possession of his freehold except by the process of common law."

And, again, in the third and ninth years of his successor we find the commons angrily and bitterly complaining of the *writ of subpœna* alleging that such writs were an invention of no later date than the time of the late King Richard, "when John De Waltham, Bishop of Salisbury, first found out that novelty contrary to the form of the common law of the realm." Even after this, clamors were raised in the time of Henry the VIII. by those who were hostile to Equity jurisdiction; and as late as the reign of James the I., a controversy was warmly conducted by Lord Coke against, and Lord Ellismere for, the power of a Court of Equity to give relief against a judgment in the common law Courts.

Mr. Speaker, much of this is familiar learning to the numerous and distinguished members of the legal profession who surround me, but there are unprofessional men to whom it is new, and it will prepare the minds of all of us to see *why* the English lawyers would never give to the proceedings

orders and decrees of a Court of Equity, the high character of "records," "which import in themselves such incontroulable verity that they admit of no proof or averment to the contrary, insomuch that they are to be tried only by themselves;" and to this effect are the decisions.

Lord Coke says: "*Recordum* is a memoriall or remembrance in rolles of parchment of the proceedings and acts of a Court of justice which hath power to hold plea *according to the course of common law*, of real or mixed actions, or of actions *quare vi et armis*, or of personall actions, whereof the debt or damage amounts to forty shillings or above, which we call Courts of Record, and are created by parliament, letters patent and prescription.—Coke upon Litt. 260 a.

So: "*Record* is a writing in parchment, wherein are enrolled pleas of *land*, or common pleas and criminal proceedings in "courts of record," and *records* are confined to such courts only, and do not extend to the rolls of inferior courts, the registries of the proceedings whereof are not properly called *records*." "It has been held that a deed enrolled or a decree in chancery enrolled are not *records*, but a decree or a deed recorded; and there is a difference between a *record* and a thing recorded."—Jacobs Law Dic., title Record.

So: Mr. Attorney-General Wirt, in giving an official opinion to the Secretary of war, writes, "the phrase "court of record," is borrowed from the English law, and it is proper to look to that law for its meaning. According to the English law, those only are "courts of record" *which proceed according to the course of the common law;* which have jurisdiction in all actions, real, personal or mixed, above the value of forty shillings; which have the power to fine and imprison; and which record or enroll their proceedings in perpetual testimony thereof. According to that law, the mere fact of *keeping a registry of its proceedings* is not enough to make a court a "court of record." For the court of Admiralty and the Ecclesiastical courts do this; yet are they not courts of record, in England; *because they do not proceed according to the course of the common law, but according to the course of the cannon or civil law.*"—Opinions of Attorney-Generals of U. S., vol. 1., 231.

So also; "There are several of the King's courts *not of record*, as the *Court of Equity in Chancery* the Admiralty courts, &c."—Bla. Com. Book, 3, page 25—note.

Again; "The court of Equity proceeding by English bill is *no "court of record,"* and therefore it can bind but the person only, and neither the state of the defendants lands, nor the property of his goods and chattels."—4 Co. Inst., 84.

Again; "The Court of Equity *is not a "court of record."* 2 Com. Dig. Title Chancery, (C. 2) p. 214.

Again; "And though the authority of the Chancery is very great, and it may restrain other courts that exceed their jurisdiction, and remove suits to itself by *certiorari*, yet *it is "no court of record,"* and therefore 'tis said can bind the person only, and not the estate of the defendant."—Jacobs' Law Dic. Title Chancery.

Again: In Doughty *vs.* Fawn, Yelverton's Reports, 226, it is decided that "it is issuable and triable by a jury whether an order of chancery exists or not, for their orders are but in paper, *and not of record* to be tried by record, but by *jury*."

Mr. Speaker, after these numerous and authoritative decisions, no one can doubt but that in England a Court of Equity was not a "court of record;" nor can any one believe that a "court of record" was other than what by these decisions it is declared to be—"*a court of general jurisdiction, conducting its proceedings according to the course of the common law.*"

Were any alterations made in this country after its settlement during the Proprietary or the Royal governments, which gave the Court of Chancery *here* a different character from what it had in *England?* Sir, unfortunately our public records are so imperfect that I cannot lay hold of the act of Assembly under which the old Court of Chancery was organized. But enough appears to show what was the character of that court during the Proprietary government, which existed from 1663 to 1729.

In the first place, our progenitors were Englishmen by birth or descent, with the prejudices and feelings and views of Englishmen, they brought their ideas of courts, and laws and government from the old conntry; and, besides, in the second

charter of Charles II., dated the 30th of June, 1667, the Lords Proprietors were allowed to legislate—"to do all and every thing and things, which unto the compleat establishment of justice, unto *courts, sessions and forms of judicature*, and manners of proceeding therein do belong, provided, nevertheless, that the said laws be consonant to reason, and as near as may be conveniently *agreeable to the laws and customs of this our realm of England.*"

And in an act of the General Assembly of the year 1715, Chap. 22, the Governor and Deputies of the Lords Proprietors, (who were the judges and chancellors in the Court of Chancery established in North Carolina,) were required, before acting as judges or chancellors, to swear to administer justice *according to the laws and customs appertaining to the Court of Equity in Chancery, in England.* Davis' Revisal of 1765, p. 4.

There are some rare manuscript copies of our old statutes, three in number, to which, Mr. Speaker, I have had no opportunity of referring, of which, Dr. Hawks, in his late "History of North Carolina," says: "the most perfect is in his possession, and that a collation of the three has led to the agreeable discovery, that we are now probably in possession of all our old statutes, the obsolete as well as the repealed." The conclusions to which this distinguished divine has arrived, with regard to the character of our Court of Chancery under the Proprietory government, with the means of information just alluded to before him, are entitled to much weight, and may be found in Hawks' "History of North Carolina," vol. 2, page 203. Of this Court of Chancery, he says—"it was composed of the Governor and Deputies of the Lords Proprietors, ex officio." "Of this court, however, we know but little more than that it was a tribunal with equity jurisdiction, and had *but little business* to do; so that its suitors probably escaped the proverbially interminable delays complained of in the Chancery of the mother country, *on which it was modelled. Its forms and practice as far as we can discover, were (allowing for difference of circumstances) similar to those in England*"

It appears then, sir, that up to 1729, the Court of Chance-

ry in North Carolina was identical in character with the same court in England. Nor, does it appear, from any investigation which I have made—and I have made a careful and long continued search—that the character of our Court of Equity, in this country, was changed so as to make it a "court of record," during the Royal government, which lasted, from 1729 to the Revolution in 1776.

From all which, Mr. Speaker, I draw the following inevitable conclusions:

1st. That when the constitution of 1776 was framed, the technical terms—"court of record"—did not include a court of Equity within their meaning.

2nd. That by a "court of record" was meant a court of general jurisdiction, which conducted its proceedings *according to the course of the common law*, and recorded or enrolled such proceedings in perpetual testimony thereof.

Sir, it would be an insult to the understanding of this body, for me to waste their time, so much of which I have already occupied by going on to prove, that even if our Court of Equity is *now* a "Court of Record," by an express enactment, (which I do not believe to be so) yet, that even *now* it does not come within the definition of a "Court of Record," as that entity was understood in 1776. It wants this essential ingredient—it does not conduct its proceedings *according to the course of the Common Law.*

In the common law courts, *as a general rule*, we begin with our "capias ad respondendum," directed to the Sheriff. We arrest the Defendant—we hold him to bail—the Plaintiff files his Declaration—the Defendant his plea—and so on, till an issue is joined. Then comes the examination of witnesses *viva voce*—the trial by *jury*—the verdict—the judgment and the execution, and so substantially was it in England, and in North-Carolina in 1776.

But in our Court of Equity, *the ordinary course* is most different. First is filed the bill, then the subpœna is issued to the *Defendant* himself—he comes in and files his answer *on oath*—replication is filed thereto by the Plaintiff—depositions of witnesses, *all in writing*, follow—the cause is set down for

hearing—the Judge acting as Chancellor decides (except in special cases) law and *facts*—a decree is made instead of a judgment entered up, and an execution issues only in case the decree is for a sum of money; in other cases, the Court compels obedience to its decrees by different means.

Sir, I will not occupy more time in showing what must be so apparent to any man acquainted even with the rudiments of our laws, viz: That our present Court of Equity does not conduct its proceedings according to the course of the Common Law, and I conclude. 3rd. That a Court of Equity is not *now "a Court of Record," within the meaning of those terms as used in the 30th section of the old constitution of* 1776.

But, Mr. Speaker, I do not believe that a court of Equity has ever been made "a Court of Record" in North-Carolina by act of Assembly *in any sense*, and if it has so been made, it is apparent that the act has since been repealed, and such court reduced to its original status under the Proprietary and Royal governments.

The act of Assembly under which our Court of Equity was first established, after the independence of the State, is contained in the acts of 1782, Chap. 177 sec. 2, and is as follows: "Be it therefore enacted, That from and after the expiration of the present sesssion of the General Assembly, each Superior Court of Law shall also be, and act as a Court of Equity for the same district, *and possess all the powers and authorities withihn the same, that the Court of Chancery which was formerly held in this State, under the late government used and exercised*, and that are properly and rightfully incident to such a Court, agrecable to the laws in force in this State, and not inconsistent with our present constitution."

But in order to make it "a Court of Record" in spite of this, the gentleman from Tyrrell, will doubtless direct the attention of the House to the 4th section of this same act, passed, as our revisals say, "to give the title to the Court," which reads thus:

"Be it further enacted, That from and after the expiration of the present session of the General Assembly, each Superior Court of Law in this State shall be *called* in all court pro-

ceedings—the Superior Court of Law and Equity for its respective district, and shall have the like jurisdiction in the said district in matters of Equity as it now has in matters of law, and shall be deemed equally *for that purpose*, a Court of Record."

I contend that by this closing expression, it was not intended to make the Court of Equity a Court of Record. If that sentence was intended to fix the *character and authority* of the Court, why does it not appear in the 2nd section, where the powers and authority of the court are fixed and enumerated? Why is it added in a closing section, which is entitled, in the revisal made under the authority of the General Assembly by Potter, Taylor, and Yancey, and printed in 1821. "*Title of the Court?*"

And to what end the insertion of the words "*for that purpose*" in connection with "court of record"? The sense and the sentence is complete without these words; if the intention of the act was to make a Court of Equity just such a "court of record" as the Superior Court was, it would naturally read, "and shall be equally a court of record."

The words "for that purpose" must mean something. What is it? *They qualify the previous part of the sentence, and make the Court of Equity a court of record, to the extent that it was necessary it should be such, in order that it might have "the like jurisdiction in matters of Equity, that it now has in matters of law.*"

And there was a reason for its insertion. The proceedings of Courts of Equity, Admiralty Courts, Ecclesiastical Courts, and even of some inferior courts, though not "*records*," strictly speaking, are in the nature of records, or "quasi of records" as it is styled in law—though not pleadable as records, nor always conclusive when produced, they have much authority, and are, in many instances, admissible evidence, when supported by the same character of proof which is required for authenticating "records." Hence, this clause was probably inserted for *the express purpose* of providing—since the Court of Equity was annexed to the Court of Law—that the proceedings, orders and decrees on the equity side of the docket

should have *just such authority and weight, and no more*, as was then understood to inhere in and attach to decrees of Courts of Chancery.

But, if this act of 1782 did make the Court of Equity a "court of record," it has been twice since expressly repealed. In the "Revised Statutes" of 1836–'7, Chapter 32, section 1, the second section of the act of 1782, referred to above, is re-enacted "*totidem verbis*"; whereas, in the 2nd section of the 32nd Chapter of the "Revised Statutes," which gives the style of the court, it is only enacted, "such court, in all equity proceedings, shall be styled and called the Court of Equity for the county in which it is held," and nothing is said of its being a "court of record." The whole of the residue of the 4th section of Chapter 177, of the act of 1782, which it is contended made it a "court of record," is omitted.

And in the "Revised Statutes," Chapter 1, section 2, *all former acts on the subjects embraced in the Revised Statutes, are repealed after the first of January*, 1838.

And so in our "Revised Code" of 1856, Chap. 32, sec. 1 and 2; the 1st and 2d sections of the 32nd Chapter of the "Revised Statutes" are copied word for word; and the same repealing clause occurs in the Chapter entitled "Revised Code," as appears in the "Revised Statutes," Chap. 1, sec. 2.

It is clear then that if the act of 1782 made our Court of Equity a "court of record," that portion of the act has been repealed by the "Revised Statutes" of 1836 and 1837, and the "Revised Code" of 1856, and the Court of Equity is not *now* a "court of record" if it was not such under the colonial government, and I have already shown the Court of Chancery under the colonial government was not a "court of record."

But it is further insisted, as I am informed, that as the "*records*" of the Court of Equity are sometimes spoken of in our statutes, and especially as Clerks and Masters are required by Chap. 20, sec. 5, of the "Revised Code," entitled "Clerks and Masters in Equity," "to keep a fair and distinct *record* of the proceedings of the court," we must conclude that our Legislature recognizes the Court of Equity as a "court of rec-

ord." Mr. Speaker, this seems to me a "most lame and impotent conclusion."

Every authority upon which we can put our hands, in England, decides that a Court of Equity is not a "court of record." Yet, in all the law books of the highest authority, in the British statutes, even in the very decisions which expressly declare that a Court of Equity is not a "court of record," the proceedings of that court are spoken of as "the *Records* of the Chancery." We are, I trust, to discuss this matter in sober sadness, and time would fail me, and I should exhaust the patience of this House still more, were I to pause to adduce authorities upon so small reason. Let gentlemen, if dissatisfied, examine British statutes; look into Adams and Story on Equity; read Coke and Blackstone, and verify what I have said. It is proper that such proceedings should be called records in that connection; they are, as I have said before, quasi of record, and that term, "*record*," describes them more nearly than any term that we can find in the law. The clause which directs a Clerk and Master to keep a clear and distinct record of the proceedings of the court is of little weight. The charter of the city of Raleigh directs the Mayor to keep a minute of the proceedings of his court; who will pretend that it is thereby made a court of record? Yet it proceeds, for the most part, "according to the course of the common law," but it needs that other portion of the definition, it is not a court of general jurisdiction.

This clause appears, as I have said, under the chapter concerning "clerks and masters in equity," not in the chapter concerning "Courts of Equity"; the Court of Equity was created and organized by the act of 1782, as before stated; the office of Clerk and Master in Equity was created by an act of 1787—Chap. 287, sec. 3—and in this act, prescribing the duties of Clerks and Masters in Equity, does the provision first appear, which directs him, among other duties, to keep a clear and distinct record of the proceedings of the court. Can it be possible that the Legislature intended, in this indirect manner, to alter the whole nature of the Court of Equity? I, for

one, cannot believe it. I can never bring my mind to admit so singular a proposition.

Mr. Speaker, when the General Assembly desired to create a court, and make it of record, it knew how to proceed. The act of 1804, Chap. 660, sec. 2, concerning the old Court of Conference, enacts, "that it shall be deemed a Court of Record." So "Revised Statutes," Chap. 32, sec. 2, enacts with regard to the Supreme Court; "that it shall be deemed a Court of Record;" and the same form is followed in the "Revised Code," with respect to the same court, in the act entitled "an act concerning the Supreme Court;" and by reference to the Revised Statutes of New-York, I find that the Legislature of that State, when it made the Court of Chancery, a "court of record," did so by expressly enacting it; 2nd R. S. of N. Y., page 276., Tit. courts, sec. 1; and the same will be found to be the case in Georgia, where the Court of Equity has been made a Court of Record, by express enactment.—Prince's Digest of Geo. Laws, page 420; and I doubt not that on sufficient search we would find the same course has been pursued in every Legislature in the United States. And yet we find gentlemen in this chamber insisting that it is reserved to poor old North-Carolina, not only to find out a mode of creating a "Court of Record" indirectly, in marking out the duties of a petty officer, but by this indirect means they propose to alter the organic law of the State.

The argument is of some force, that expressions are constantly to be found in our Statutes, which negative the opinion that our Legislature recognizes our Court of Equity as a Court of Record. Sir, penalties are imposed in numerous acts of assembly, which are made "recoverable in any court of record," they can be pointed out if gentlemen desire. What lawyer has ever conceived that the Legislature meant to give jurisdiction in such matters to Courts of Equity? Offences are sometimes made "indictable in any court of record;" who will imagine that criminal jurisdiction is thereby conferred on Courts of Equity? I have noticed in a former part of my argument, that Statutes do not inflict penalties upon "Clerks of any court of record," in so many words, but

upon "Clerks of the County and Superior Court," and then upon "Clerks and Masters in Equity." And in a very old Statute, to which I shall now refer, which I believe has been enacted and re-enacted in every revisal of our laws that was ever made, and which is re-enacted, both in the "Revised Statutes" of 1836–'37, and in the "Revised Code" of 1856, the distinction is clearly drawn between "Courts of Record" and Courts of Equity. By referring to "Revised Code," Chap. 34, sec. 31, gentlemen will find a Statute in the following words: "If any person shall steal or for any fraudulent purpose shall take from its place of deposit for the time being, or from any person having the lawful custody thereof, or shall unlawfully and maliciously obliterate, injure or destroy, any *record, return, panel, &c., or any original document whatsoever*, of, or belonging to any *court of record, &c., &c.*, or any *bill, answer, interrogatory, &c., &c., or any original document whatsoever*, of, or belonging *to any Court of Equity, &c., &c.*, such offender shall be deemed guilty of a misdemeanor, &c."

In this statute, which is fully and particularly drawn, two things are observable: the term "record" is only used in speaking of documents which appertain to "*courts of record;*" and, further, it seems to have been conceded that the general terms "any original document whatsoever of or belonging to any "court of record," did not include "original documents of or belonging to a court of Equity." Pray, Mr. Speaker, why all this verbiage if our Legislature thought that a court of equity was a "court of record?"

Sir, I shall say no more upon this branch of the resolutions, but if I have made myself understood I flatter myself that I have established the following propositions:

1. That constitutions being restrictions upon the sovereignty of the people ought to be strictly construed, especially in such clauses as deprive a certain class of citizens of rights and privileges which inhere in them as citizens, and are common to all other citizens.

2. That by this mode of construction the term "*clerk*" used in the 30th article of the old constitution cannot be extended so as to include a "clerk and master."

3. That the Legislature cannot by enactments in the ordinary way alter the fundamental law *directly*, nor can it do so *indirectly* by altering the meaning of words, or by giving to *different* entities, *names* used in that fundamental law.

4. That a "court of record" in 1776, as those terms are used in the 30th article of the old constitution, meant, a court of general jurisdiction proceeding according to the course of the common law, and a court of Equity was not *then* such a court.

5. That a court of equity *now* (even if made a court of record by express enactment) is *substantially* and *essentially* what it was in 1776, and is not now a court of general jurisdiction proceeding according to the course of the common law; and therefore is not now "a court of record" within the meaning of those terms as used in the 30th article of the old constitution.

If these propositions are established my case is made out, "a clerk and master in equity" is not "a clerk of a court of record" within the meaning of the constitution; and I care not one farthing whether a court of equity is *now* a court of record in *some other sense* or not; but fearing the inadequacy of my powers to conceive and deliver clearly to others an argument which, if clearly conveyed, to me appears unanswerable; I have gone on further to establish:

6. That a court of equity in North-Carolina is not *now* "a court of record" in *any sense* of those terms.

But, Mr. Speaker, the resolutions advise me, that I am arraigned under another clause of the constitution, contained in the amendments to that instrument, which came in force on the 1st day of January, A. D., 1836,—Art. 4, sec. 4th—which reads thus: "No person who shall hold any office, or place of trust or profit under the United States or any department thereof, or under this State or any other State or government, shall hold or exercise any other office or place of trust or profit under the authority of this State, or be eligible to a seat in either House of the General Assembly; provided that nothing herein contained shall extend to officers in the militia or justices of the peace."

Now, Mr. Speaker, when I read *this* article carefully, I was at first much shaken in my opinion, for under the clause first discussed, I have never had a doubt of my right to a seat; but a careful and laborious examination has forced me, to settle down in the conviction, that even *this clause* does not extend to Clerks and Masters in Equity. Let the House mark the peculiar wording of this section: it speaks of a person who "holds an office or place of trust or profit under the United State, *or any department thereof*"; and then *simply* of a person "who holds an office or place of trust or profit *under this State*"; and says that no such person shall be "eligible to a seat in either house of the General Assembly." May I ask why this difference of *wording* with regard to Federal offices, and with regard to State offices, in the very same clause of the same section of the same article, if there was not a difference of *meaning*? When conventions make constitutions, they are carefully drawn, by men who know the meaning of words. Especially do we know that the amendments to our constitution, were framed by the ablest in the State, who were accustomed to construing statutes and constitutions; that many of these amendments had been under consideration, and discussed before the people for nearly or quite, a quarter of a century; that they were not hastily, but deliberately framed, read three times in convention before they passed, and then carefully discussed and amended before they were submitted as a whole to the people.

When we find a different *wording* on the same subject matter, in a constitution thus framed, we are bound to conclude that *there was and is a difference of meaning*. To show what this difference of meaning is between the phrase used as to Federal officers, and that used as to State officers, and that a proper interpretation of the clause in question excludes Clerks and Masters from the operation of this section of our constitution, shall be the object at which I now aim.

But let me ask this House—however limited my capacity, however humble my acquirements, however small my reputation—to give to my *arguments*, feebly as I may urge them, their full weight. I feel, Mr. Speaker, that I have need to

ask this indulgence. I stand before the House to-day *alone*; not another voice will be raised in my behalf. I stand alone, without the adventitious aids of age and experience to give weight to my words. The snows of many winters have not whitened my head, nor has Time bestowed upon me that wisdom which he alone can give; while I know that the gentleman from Tyrrell (who, I am informed, is to reply to me) has been in frequent counsel with a late distinguished Attorney General of this State, now resident in this city I do not complain of this, doubtless the gentleman alluded to, is actuated solely by a love of the constitution and a desire to perpetuate its provisions, but the weight of *his* opinion will be adduced against me. I know well what that opinion is; I have in my possession an article written by that distinguished jurist in 1838, upon the proper interpretation of the section of the constitution now under consideration. I doubt not the gentleman from Tyrrell has conned it well; and with good reason, for, sir, this experienced lawyer, is a man for whose legal attainments I, for one, have the profoundest respect—a man distinguished for his wisdom and his learning—a man remarkable for his talents and his successes—a man from whose *errors* even, I have often gathered more of light and information, than from the *logical* arguments of lesser men. I have cause to fear the weight of *his authority*. I ask of the House, then, to investigate the *reasoning* upon which *his* opinion rests, to examine the *arguments* upon which *I* base my conclusions, and to *decide for themselves.*

Mr. Speaker, I am here not as an *advocate*, but sworn to observe the Constitution. I shall take no position which I do not *think* I can maintain; I shall not detain the House with quibbles, as to what constitutes an *office*, or as to what the meaning of the word *eligible* is. *I believe* that the clerk and master holds an *office*; I believe that the word *eligible* applies to the *day of voting, and to a man's qualifications on the day of election.* I shall admit it.

But I shall endeavor to convince this House that a Clerk and Master in Equity, is not within the meaning of the terms

"officer *under this State*," as those terms are used in the constitution.

Let us, sir, look to the history of our legislation upon this subject, of excluding citizens from two offices, in order that we may ascertain the policy of the State upon this subject, and the reasons upon which that policy rested, and see what light it throws upon the section under consideration.

In the old constitution, Sec. 26, it is declared that "no Treasurer shall *have a seat* in either the Senate, the House of Commons, or Council of State." In Sec. 28, "That no member of the Council of State shall *have a seat* in the Senate or House of Commons." In Sec. 29, "That no Judge of the Supreme Court of Law or Equity, or Judge of Admiralty shall *have a seat* in the Senate, House of Commons or Council of State." In Sec. 30, "That no Secretary of this State, Attorney-general, or Clerk of any Court of Record, shall *have a seat* in the Senate, House of Commons, or Council of State." These are the clauses which exclude citizens from office, *simply because they already hold another office*. It is true, Sec. 28 excludes receivers of public moneys from the General Assembly and eligibility to office, until they shall have accounted for all sums for which they are liable. Section 27 excludes officers in the regular army or navy of the United States, or of this or any other State, and contractors for supplies to such army or navy, from the General Assembly and Council of State. Sec. 31 excludes preachers of the gospel from the same offices or places, and Sec 32 excludes persons from holding *any office or place* within the civil department of the State who entertain certain religious opinions, but these last exclusions are not because office is already held by such persons, but for other reasons apparent upon the face of the sections.

Now, thus far, two things are observable, as to these exclusions from office *simply* because another office is already held by the person.

1. That the constitution only says, he shall *not have a seat*, and says nothing as to *eligibility*.

2. That the exclusions (with the exception of clerks of courts of record) extend only to the higher officers—Treasurer, Coun-

sellors of State, Judges of Courts of Equity, Law and Admiralty, Secretary of State, and Attorney-general—all officers *who form a part of the chief political power of the State*—that is to to say, the chief Executive or legislative power, or both combined—*or who derive their authority immediately from the chief political power of the State*—all this, with regard to *officers under this State*, the policy of our legislation so far as they were concerned seems to have confined the exclusion to such as are above described.

But after the present constitution of the United States was adoped, and ratified by the convention of North-Carolina, Nov. 21st, 1789, we begin to see the policy of the State developed, with regard to the exclusion of Federal officers from the State Legislature, and from other offices or places of trust or profit under the State. As early as 1790, an act was passed—Chap. 317, sec. 1—which declares, "That from and after the passing of this act, no person whatever, shall be *eligible* to a seat in the General Assembly of this State, who, at the time of election to such seat, or at the time of taking the same, shall have or hold any office of trust, profit, or emolument, *under or by appointment of the United States, or any officer thereof.*"

The 2nd section prevents officers under the authority of the U. S. from holding offices under the authority of this State. The 3rd section brings Senators and Representatives of this State to the U. S., within the purview and meaning of the law, and excludes them from all State offices.

Again; in an act of 1792, Chap. 366, sec. 1, it is enacted, "that any officer, civil, military, judicial, or otherwise, who now does, or who hereafter may hold any office or appointment from the authority of this State, and acting at the same time in any office, or under any appointment from the Congress of the United States, *or any department thereof*, at the same time, without resigning his State appointment, shall for every such offience forfeit and pay the sum of one hundred pounds."

These acts were amended in an act of 1793—Chap. 393, sec. 1—and in an act of 1796—Chap. 450, sec. 1—it was declared,

that all and every *collector of the excise* or any revenue accruing to the Federal Government, is within the true intent and meaning of the laws of 1790,-'92, and '93; and this act further prohibits any such collector from presuming to exercise the appointment of "*county trustee, treasurer of any denomination*, or collector of any revenue arising to this State." And in an act of 1811—chap. 811—these laws are again amended, in no very essential particular: from the consideration of which enactments, I draw the following conclusions:

1st. All these acts of 1790, 1792, 1793, 1796, and 1811, each strengthening or explaining the other, appearing upon one Statute book, and no acts appearing, extending or explaining the provisions of our old Constitution; it would appear that our State manifested an increasing jealousy of the officers under the Federal Government sitting in her General Assembly, and holding other offices under the State, but manifests no such progressive jealousy with regard to officers under the government of our State.

2nd. That while such exclusion as to *State officers*, was confined to the *highest* only—those immediately under the State—described *by name* in the Constitution; and also was restricted to their "*having a seat*" in the General Assembly; as to *Federal officers* it was *in general terms extended to all*, and embraced their *eligibility* on the day of election.

3rd. That in order to exclude *all officers* under the United States from *the Legislature*, the terms thought necessary in these Statutes, were not only *officers under the United States*, but, officers "*under* or *by appointment of the United States*, OR ANY OFFICER THEREOF;" and in order to exclude them *from other offices under this State*, the terms thought necessary, were officers "under the Congress of the United States, or *any department thereof*," in the acts of 1790 and 1792.

4th. That it was doubtful whether, even under the very broad terms used in these statutes as to federal officers, an officer deriving his authority remotely from the United States—as a collector of excise—was included within their provisions or not, and the act of 1796 was passed declaring such officer to

be within the true intent and meaning of the acts of Assembly.

5. And finally, that this act of 1796 does not stop here; nor does it declare that "county trustees, treasurers of any denomination, or collectors of any revenue arising to the State" are included within the general terms, *officers under this State*, used in said acts; but it impliedly declares that such petty officers are not intended to be included under these general terms, by adding a section further providing, that no such collector of federal revenues shall presume to hold these petty offices, above enumerated, under a penalty.

From all which, I conclude that the policy of our Legislature, up to 1811, seems to have extended the exclusion from other offices *to all federal officers, no matter how remotely they derived authority from the United States.*

Mr. Speaker, I find no other legislation upon the subject under discussion, until we come to the article and section of the constitution of 1835 and 1836, now under consideration, which declares "that no person who holds any office or place of trust and profit *under the United States or any department* thereof, or *under this State*, or under any other State or government, shall hold or exercise any other office or place of trust or profit under the authority of this State, or shall be eligible to a seat in either House of the General Assembly."

We are prepared now to see why officers under the *United States* or ANY DEPARTMENT THEREOF, and only officers *under this State*, are made ineligible to our Legislature and incapable of holding other offices or places under this State. The convention was carrying out the policy of our State previously adopted, and while it desired to extend the exclusion to *all federal offices, whether they derived their authority directly or indirectly, mediately or immediately from the United States*, it desired to extend such exclusion of State officers *only to those who derived their authority immediatdy from North Carolina.*

Most of such high State officers were, by *name*, excluded from "*having a seat*" in the General Assembly, by the old

constitution; what reason for this amendment as to them? This amendment says, not only shall *they* not have a seat while they continue such, but they shall not be *eligible* on the day of election; and *they* and *all other officers* now existing and hereafter created by law, *of a like nature*, deriving their authority immediately from the same source—directly from the Legislature or the chief Executive, or both, or forming part of the chief political power of the State—shall be in like manner ineligible to the General Assembly, and incapable of holding any other office or place under the State.

The *reasons* upon which this exclusion of State, and of Federal officers from offices under the State rest, are totally different, and hence the distinction made between the two sets of officers in our Legislature and our constitution.

All Federal officers are excluded from participation in our State government, because of a State jealousy of Federal power; we say that no man who is under the influence of the Federal Government or any department thereof—no matter how remotely—shall exercise any power in our government, fearing that he may be controlled in the exercise of his State functions by a foreign influence. North-Carolina was, as is well known, one of the last States to adopt and ratify the constitution of the United States, and she has ever continued this jealousy of Federal encroachments.

But the State is not fearful of the liberties of the State being overturned by an officer trusted in one office, because the *power* which appointed him to that office, *will act through him* while he is performing his functions in another office.—The State is mediately or immediately the authority on which he depends, and to which he is responsible in both cases, and the very fact that he is worthy of reliance in one place of trust, is an argument in favor of his being fit for another.

Nor is the reason why the holding of many offices is forbidden, and *that* in the fundamental law, *simply* on unreasonable desire to prevent a citizen from accumulating offices. So far as the State regards offices as the rewards of merit, to be *scattered* among all her citizens, and wishes to enforce as near as may be an equal distribution of wealth, as is proper in

republics—*these* are provided for in the 35th sec. of the old constitution, which declares that "no person in this State shall hold more than one *lucrative office* at any one time;" and pausing on this for a moment, I will merely quote a distinguished jurist, who remarks: "It was early settled that membership of our legislative bodies, was not, in the meaning of the constitution a lucrative office. It was held to be a place of trust." So that I cannot be excluded from my seat under this section.

What, then, is the reason upon which this rule against dualty of State offices rests? Sir, it is a great fundamental principle of liberty, contained in Sec. 4th of the "Declaration of Rights," which declares: "That the legislative, executive, and supreme judicial powers of government, ought to be forever separate and distinct from each other;" and so far as making "*not eligible*" to the General Assembly is concerned, *that term* is used, to exclude "patronage and power from coming in conflict with the freedom of elections"—to prevent an officer using his *power and influence* to secure his election to the Legislature. Mark, Mr. Speaker, the making him *ineligible*, contemplates that he *can never get a seat* in the Legislature; it is no fear of what such officer may do for himself, and his office, after *he gets a seat* that underlies this provision, he is incapable of election—he can never obtain a seat.

The objects herein stated, then, and *these alone*, are the ends aimed at in the 4th sec. of the 4th article of the amendments to the constitution, upon a fair construction of the whole section, and of the whole constitution.

The wording of the section itself then, the policy of our State Legislature, and the objects aimed at by that policy, all indicate that by the phrase "*officer under this State;*" only such officers are included, as exercise some *high functions* of the State sovereignty, and derive their power and authority from the Chief Executive, the General Assembly, or both combined, or who form a portion of the chief political power of the State.

Mr. Speaker, who then asserts that a clerk and master in Equity comes within this provision? Does he come within

the reason of the rule? What legislative, judicial or executive *power* does he possess? What power and influence can he wield to corrupt a constituency and secure a seat in the General Assembly? He is a mere *ministerial officer*, under the *absolute control* of a Judge in the performance of his duties —a mere instrument through whom that Judge manages the details of a Court of Equity—almost a pen in the hands of the judicial writer. And whence does he derive his authority? From a Judge, who is appointed by the General Assembly and commissioned by the Governor—he holds no commission running in the name of the State—he holds no commission at all—here in my hand is the power under which I act—the evidence laid before the Committee on Privileges and Elections, upon which they reported to this House that I was a Clerk and Master in Equity for the county of Wake. Look at it; a slender slip of paper, bearing not even the date nor the time I was appointed—stating that the office has become vacant by the expiration of the term—that the present incumbent is reappointed—that he gives a sufficient bond, and is inducted into office for the space of four years. Is this the mode, think you, in which officers under the State of North-Carolina are vested with authority?

Yet, look further, Mr. Speaker—is it possible that I was *incapable of election* on the day of the voting—that the framers of our Constitution so intended—for fear that I should use the *power and the influence* which this position gave me to secure votes? Sir, it was but a few years since, that the incumbent of one of the United States Senatorships from this State was *elected* by our General Assembly, to his present high post, he being at the time, Governor of North-Carolina—with much power,—with wide influence—with extended patronage. It is but yesterday sir—I may say—since the present Governor, who adorns our Executive office, was considered eligible, and voted for in this very body, by a large majority, for the office of United States Senator. During this very session, a leading and distinguished member in the other chamber, was conceived to be eligible, and was elected to the lucrative and honorable office of Solicitor for one of our judicial districts, and so I might cite innumerable examples.

Can it be believed by the most credulous, that the framers of our Constitution intended to leave it in the power of these high officers to use all the influence—the power—the patronage—which their position gave them to secure a high and lucrative office ; and yet that they feared to leave it in the power of a Clerk and Master in Equity, a County-Attorney, a Constable, "*et id omne genus*," to use the power—the influence—the patronage—which their humble positions give them, to secure a seat in the Legislature of North-Carolina? I cannot so stultify the framers of our fundamental law.

Look, too, at the closing sentence of the section under consideration, which excepts from the operation of this section, "Justices of the Peace and Militia officers." This exception, I hear is used against my position, upon the general legal ground, that the exception of one or more of a class by name, from the provisions of this clause, shows that *all others* are included; but while I admit the principle, I deny the accurate application. In this case the class is "offices under this State;" that is, offices derived immediately from the chief political power of the State ; and Justices of the Peace, elected then and now, by the General Assembly, commissioned then and now, by a commission from the Chief Executive, running in the name of the State of North-Carolina ; also all commissioned Militia officers, commissioned then and now in like manner, coming *within the class*, must be expressly excepted by *name*, if it was the true intent to except them. While there are many minor offices, deriving authority, *more remotely* from the State, which are not included, nor intended to be included in the class, and hence there was no need of exception. But one thing plainly appears from this exception, that the Constitution permits Militia officers, even Major-Generals, (who exercise certainly at times much more power than Clerks and Masters,) and officers of a like character, to be eligible to the Legislature. It extends to Justices of the Peace the same privilege ; its framers did not fear to leave it in *their* power, to use such means as their position gave them, to secure an election to the General Assembly, and yet how numerous the functions which they perform—how extended the authority

which they wield! They fine, they imprison, they try singly petty cases, in their County Courts, they lay county taxes, they take official bonds, they elect numerous officers, they decide upon elections, they try any and every *civil* cause brought before them, they try and punish in misdemeanors and petty larcenies; and yet I am told officers with absolutely *no power*, are *included*, in the very clause from which they are *excepted* on account of their comparative unimportance.

The construction which is contended for on the other side is, that the terms "office under this State," mean any office derived from this State, *no matter how remotely;* and perhaps this would be a correct exposition, if this expression stood alone in the Constitution, and alone in the section; but the same section, in the same connection, speaks of "office *under the United States* OR ANY DEPARTMENT THEREOF." Now such a construction would evidently include *all* officers and placeholders in this State. It has been attempted, I know, to give to the phrase, "office under this State," the meaning of "any office of a public character, wherein duties are discharged for the State;" "to ascertain whether an office or place, be an office or place under the State, the *duties* thereof must be looked to as the deciding and *only* test," says the same learned jurist to whom I have before referred. But with becoming diffidence, I entertain a different opinion. If we say that General Cass is Secretary of State, *under* James Buchanan, do we mean that he performs duties and functions for James Buchanan? If we say that such a man was a subaltern, *under* some high officer, do we expect that the nature and character of the duties to be performed by him relate to that high officer? The centurion in the scripture says, "I also am one under authority, having soldiers *under* me." The words evidently mean "*an office derived from the authority, or by the appointment of the State; or held in subjection to the State.*" "*Under*," in this connection, indicates some *superior* from whence power is *derived*—to whom the officer is subject. The duties and functions of the office may be discharged for an individual—for a corporation—for a foreign power; but when the office is derived from, and held subject to the State of

North-Carolina, then is it "an office under this State;" any other construction gives to the words a new and contorted meaning. But I do not know that even this liberal construction would narrow the *exclusive* operation of the section under consideration; every officer, even of a private corporation, (which derives its existence from the Legislature,) is in some sense performing duties for North-Carolina. Trustees of the University, Heads of Corporations, Directors, State and private, in Railroads, County Trustees, Overseers of roads, Entry takers, even Attorneys-at-Law, perform functions and duties for the State. But I think the meaning of the word, "under," in this connection is explained in the Statute of 1790, to which I have referred; on looking at the original of that Statute, this expression will be found, "*under or by appointment of the United States*, or any officer thereof," now "*or*" in this position not being preceded by a comma, indicates that *the* "*under*," and the by "appointment of," are equivalent, at least synonymous, terms; observe that where a comma precedes the, *or*, as it does, the second "*or*" which occurs in the sentence, it indicates that the second member of the proposition, is something different from the first; numerous examples could be cited, from innumerable authorities, to establish this; as in Webster's dictionary: "Of," 1st definition "*from* OR *out of;*" "*under*," definition, "*in a state of pupellage* OR *subjection to;*" but in an example given under the difinition of the word "or," "he may study *law*, OR *medicine*, OR *divinity*, OR *may enter into trade.*" I will not weary the House by multiplying examples. I think then, Mr. Speaker, I have established, that "an office under this State," means *an office derived from the authority, and by appointment from this State, and held in subjection thereto.*

But to what absurd, dangerous and monstrous conclusions must this construction lead, which includes me and all other officers or place-holders in the State,—no matter how remote their derivation of authority,—under the meaning of this section of our constitution; for, Mr. Speaker, if we go one step beyond an *immediate* derivation of authority and office from the chief political power representing the sovereignty of the State, there is no other link in the chain of derivations at

which we can stop; there is no other degree in the scale of descents where we can rest. We must carry the doctrine throughout all the petty ramifications of our political system!

Half of our citizens must be disfranchised and deprived of the capacity for receiving office or place, no matter how petty and minute that office or place may be. County Attorneys are all disfranchised, Overseers of Roads, Wardens of the Poor, County Trustees, Constables; Heads of Corporations—no matter how petty the corporation may be—must go along with them; for the corporation derives its corporate power and authority from the State, and under that power its head is created; so of their smaller officers, treasurers, secretaries and directors; all such must hold "*offices or places of trust or profit under this State:*" all Directors in Railroads, Directors in our various Asylums; indeed, time would fail me to enumerate all the various offices and places that must be included. Even Attorneys at Law, who are officers of courts, deriving their authority from the State, through the medium of the Supreme Judiciary, (as close a derivation from the State as the office of Clerk and Master) are rendered by our constitution ineligible to our Legislature and incapable of holding office.

Does the House intend to disfranchise all these good citizens of the State, and they, men, for the most part, more capable of performing duties for the State, than in general, citizens are? Will the House put a construction upon a deliberately and carefully prepared instrument which leads to this monstrous result; and that when a way of escape is suggested, and as I think, sustained?

But, Mr. Speaker, if the construction contended for is correct, I, and all other officers that are said to be included within that clause, are liable to an impeachment by the House of Commons, and a trial by the high court of the Senate, for wilful violation of the constitution, for maladministration or corruption; *in order that we may be removed from office*, and disqualified for holding other offices or places under the State; for the judgment of the Senate *can* extend no further than to such *removal* and *disqualification*. What an occupation for the General Assembly of a great and sovereign State!

Did those who framed our constitution intend that a Clerk and Master in Equity, a Clerk of a "Court of Record," a County Attorney, a Constable, even an Overseer of a Road, or a County trustee, were to be tried before the Senate for maladministration?

Mr. Speaker, the whole of an instrument must be construed together, it is a fair presumption that the *same or equivalent terms* used in *different parts* of the *same instrument*, have the *same meaning* attached to them. Yet in the article of our amended constitution, immediately preceding Article 4th — which last contains the section under discussion — appears — Art. 3, sec. 1—the following section: "The Governor, Judges of the Supreme Court, and Judges of the Superior Court, *and all other officers of this State* (except Justices of the Peace and Militia officers) may be impeached, for wilfully violating any article of the constitution, for maladministration or corruption." The second section provides that judgment in such cases shall only extend "to removal from office and disqualification to hold and enjoy, any office of honor, trust or profit *under this State*; but the party convicted may, nevertheless, be liable to indictment, trial, judgment, and punishment according to law."

Now what distinction can be drawn by the astuteness of the ablest lawyer between the expressions "all other officers *of this State*," and "all persons holding an office *under this State?*" If there is any difference the first phrase is *more extensive*, and may perhaps embrace all persons who perform duties or functions for the State, or who derive their authority from the State no matter how remotely—if I am an officer *under this State*—as it is contended I am—am I not also an officer *of the State?* Who conceives that *I* am liable to impeachment for maladministration?

Observe, Mr. Speaker, what an impeachment was *first used for in England:* "Impeachments," say high English authorities, "were framed, to carry into more effectual execution, the law against *too powerful* delinquents;" they would lie in England against *all* persons, official and unofficial, peers and commoners, "*for high crimes and misdemeanors*" *against the*

good of the commonwealth: their object was not a *removal from office*, but the final *punishment* of the delinquent, with death even, if his offence was so punished by law—the fear was lest men of power should escape the ordinary tribunals—hence the presentment by the commons—and even if *such men* were accused by the whole commons, before the ordinary tribunals, there was fear that the judiciary and jury, might be overawed by the majesty, dignity and force of the commons—besides the charges were offences against the very people, part of whom, in an empanelled jury, must have tried them—hence the trial by the House of Lords. This is the originial impeachment which the framers of our Federal constitution, and of our State constitution, had in mind when they each framed their articles with regard to impeachments.

With us, according to our constitution, an impeachment is different; we presumed that none would be too powerful for the ordinary process of law to reach—but men in high *official* positions, for in a republic all men stand equal—hence we confine impeachments to such *high officials*. We also confined the judgment in cases of impeachment to *removal from office* and *disqualification for future honors;* from all which I conclude that it was only offences which were committed *in the performance of official duties, and in an official character* which were intended to be made impeachable—but still the "wilful violation of the constitution, the maladministration and corruption" in the performance of official duties, which is impeachable, must be such as will amount to a high crime and misdemeanor against the commonwealth—they must be such offences as, in the language of Mr. Hamilton, "may with peculiar propriety be denominated *political*," such as "are injuries done to the society itself."

Let me ask of this House if there is *any* "wilful violation of the constitution, *any* maladministration or *any* corruption," which a mere ministerial officer, such as a clerk and master in equity, without legislative, executive or judicial authority could be guilty of in the performance of his official functions, which would amount to *a high crime or misdemeanor against*

the commonwealth, a political offence, an injury done to the society itself?"

Again, the object of impeachment is chiefly *removal from office;* it is not so much *punishment;* for the delinquent may be subsequently punished by the ordinary method of indictment for his offence; and it was with great reluctance that the constitution deprived any man of the ordinary mode of trial by jury, and a judge learned in the law, distinct and separate from the jury, even though he of his own will, had put himself in an official position, and made himself thereby liable to a different mode of trial: but it was impolitic that our statute book should teem with an apparent distrust of *high officials;* it was highly improbable that such officers would, on account of their influence, power and extensive patronage, ever be presented, indicted and *fairly* tried by the ordinary tribunals, even if their misconduct was made *indictable and removal from office* made part of the penalty, of their offences; and perhaps it was not desirable that less general terms should be used with regard to the offences of officers of exalted position than those contained in the constitution itself Still it was possible that a Governor, a Judge, a Treasurer, a Secretary of State, might be abusing their official positions to the detriment of the commonwealth, and some mode must be provided by which the officer may be stripped of his ill used authority, and deprived of that official position which was a protection from the ordinary tribunals. This mode is the impeachment by the House, and the trial by the Senate; which could only pronounce judgment against him to the extent of *depriving him of his seat* and *degrading him in future*, still leaving him a right of trial by jury before he was *punished.*

But none of this reasoning can apply to petty officials *remote from the State*—there was no impropriety in supposing they would abuse their powers—there was no objection to defining their duties, and laying down what amounted to a breach of them—there was no fear that the ordinary tribunals would fail to reach them—there was no necessity to deprive them of the ordinary trial by jury—and accordingly

all the offenees of sueh, are laid down in our statute law; while you will find very few of the offenees of higher offieers laid down; and the *punishment* of lesser offieers extends in proper eases to the *removal from office*, and *disqualification for holding other offiee*, while you will look in vain throughout our statute book for *any offenee* of an officer deriving his authority *immediately* from the State, the eommission of whieh subjects him to the punishment of being *stripped of his official character* by the *ordinary legal tribunals*. Sir, most of these very statutes were in existenee in 1835-36, when the article of our eonstitution with regard to impeaehments was framed—their existence was known to the framers of that article—there *was no necessity* for such artiele, so far as offieers deriving their authority remotely from the State were eoneerned—*there was a necessity* for such an article, for the protection of the public, against officers forming a part of the ehief politieal power of the State, or deriving their authority immediately from the chief political power of States. Must we not then suppose that it was intended to operate upon offieers of the latter eharaeter, *and upon those offieers alone?*

How ean we aeeount, sir, for the fact that the framers of the fundamental law, excepted from the operation of this seetion offieers of so high a grade as Justiees of the Peaee; and provided in a subsequent section for their removal from offiee, and future disqualification for that office, upon eonvietion "of any infamous crime, or of corruption and malpraetiee in offiee," if we suppose the intent was, that Constables, Clerks of Courts, Clerks and Masters in Equity, County Attornies, and others of the same grade, should be made liable to impeaehment? The conclusion is irresistable, that Clerks and Masters are not impeaehable; that they are not officers "of this State;" that they are not within the operation of the 4th Section of the 4th Artiele of the amended eonstitution.

Finally, Mr. Speaker, when the fundamental law intends to exelude all persons in the State from holding any offiee, —small or great—mediately or immediately derived from the State, different terms are used from "offices under this State," or "offiees of the State." See. 35th of the old constitution

reads: "*no person in this State* shall hold more than one lucrative office at any one time."

Sec. 32nd reads: "That no person who denies the being of God," &c., &c., "shall be capable of holding any office or place of trust or profit *in* the civil department *within this State*."

So in Section 2nd, Art. 4th, of the amended constitution, almost immediately preceding the 4th Section of the same Article, the expression of exclusion is the same—"shall be capable of holding any office or place of trust or profit in the civil department *within this State*;" and again, in our statute book, where a total exclusion is intended, the same terms are used in Chap. 34, Sec. 48, of "Rev. Code," forbidding duelling, part of the punishment laid down for that offence is, "and moreover, he shall be ineligible to any office of trust, honor or profit, *in the State*."

Section 119, of the same Chapter, reads: "If any Clerk of the County or Superior Courts, Clerk and Master in Equity, or any other *officer in the State*, who is required in entering upon his office to take an oath of office shall wilfully omit, &c., &c., the Clerk or other officer so offending shall be deemed guilty of a misdemeanor." I might multiply examples, but I feel that I am trespassing upon the time of the House. But if the "*argumentum ab inconvenienti*," which my Lord Coke saith "in doubtful cases availeth *much*," be of *any* avail in this case, I think I have established that a Clerk and Master in Equity is not "an officer under this State," within the meaning of the 4th section of the 4th Article of the amendments of 1835-'6 to the constitution, and I dismiss this branch of my subject.

But, Mr. Speaker, before dismissing this subject altogether, I wish to call the attention of the House, to the action of the House of Commons, and of the Senate of North Carolina, upon the section of the amended constitution now under discussion, upon former occasions.

This amended constitution went into operation January 1st, A. D. 1836. The first General Assembly under it met in November of the same year. Many of the members of the Convention were also members of that General Assembly:

In the Senate:	In the House of Commons:
James Gudger,	Whitmel Stallings,
Christopher Melehor,	John A. Averitt,
John L. Hargrave,	Fred. J. Hill,
John E. Hussey,	William A. Lea,
Jesse Cooper,	Robert B. Gilliam,
John B. Kelly,	Thomas Hooker,
Lewis H. Marsteller,	Kenneth Rayner,
Alfred Doekery,	James W. Howard,
Jos. MeD. Carson,	Henry Cansler,
Mathew R. Moore,	James W. Gninn,
William P. Dobson,	Roderiek B. Gary,
Hezekiah G. Spruill,	Moses Chambers,
Weldon N. Edwards,	Charles Fisher,
Edmund Jones,	James M. Hutcheson.
James W. Bryan,	

During that General Assembly, various questions were raised upon the 4th seetion of the 4th Artiele of the amendments to the eonstitution. In the Senate, strange to say, two of the late members of the Convention—Jos. MeD. Carson and Alfred Doekery—were among those who were eharged with violating this seetion of the eonstitution; they, at least, having been *sworn* to sustain that instrument, must have entertained views, as to the meaning of that elause, different from those entertained by gentlemen who would deprive me of my seat; and in the House, one of the delinquents—Jno. A. Averitt—was also a member of the Convention that framed the constitution.

I will not detain the House by referring to the varions parliamentary movements through whieh Senators then disported themselves. Gentlemen will find, however, by referring to the 57th, 65th and 71st pages of the Senate Journal, and then, searehing the residue of that journal through, that all the questions involved in the ease now before the Honse, upon the *last* artiele of the amendments to the eonstitution, were then before the Senate; that several seats were ealled in question; and that *general* resolutions were also introdueed,

to ascertain whether Post Masters, Solicitors, County Solicitors, Entry Takers, County Trustees, Registers, Sheriffs, Coroners, Constables, Notaries Public, Deputy Sheriffs and County Surveyors and the like, were within the meaning of the terms "*officer under this State:*" and that efforts were made to take the sense of the Senate as to the meaning of the word "*eligible*," used in that connection; and they will further find that the Senate adjourned without a final action upon *one* of the particular cases, and without deciding a single disputed point on this subject.

Gentlemen will also find, by consulting the House Journal, at pages 307, 308, 333, 335, 363, 396, 397, and 415, that the same questions were also raised, and pretty much the same course pursued with regard to them in this body; that the *facts* of numerous cases were reported back to the House, by the Committee on Privileges and Elections, and then upon motion of Mr. Hawkins, a member of said Committee, all such reports were immediately laid upon the table. Among other actions taken upon this matter, an effort was made to take the opinion of the Supreme Court, upon the questions involved. On the 21st of December, in the preamble to certain resolutions, introduced by Mr. Wm. B. Lane, to effect this, it is stated, that "great diversety of opinion exists with regard to the true intent and meaning of the foregoing section." In other resolutions introduced by Mr. B. F. Moore, on the 22nd of December, with the same object, it is set forth, that "in the construction thereof many difficulties and doubts have arisen among the members of this House." These resolutions were also laid upon the table; and since that time, I do not know whether this House has ever considered this section of the 4th article of the amendments to the Constitution or not, if it has,—in a somewhat extended search,—I have not been able to find it, in the Journals of our General Assembly. But it is well known, that not a single session, of the House of Commons, has since been held, wherein—not one—but many of the officers who are enumerated in the various resolutions introduced during the session of 1836–'7, did not hold seats.

Now, Mr. Speaker, these facts do not make *precedents*, it is

true, by an *actual decision*, but it is a well established maxim of the law, that it is better that decisions should be *settled*, than that they should be *right;* it is perhaps the strongest argument in favor of any legal question, that it has once been agitated, and has occurred again and again, in every session of a court for a quarter of a century, without ever again being raised, as a question in the cause; it is a *silent* decision, or series of decisions which is entitled to great weight.

But sir, whatever may be the effect of this history of the question involved in the resolutions before the House, as to *fixing precedents;* yet I take the position that *after it*, even if this House thinks, that the point is against me, and that I am constitutionally disqualified to sit in the House of Commons; still these resolutions ought not to pass, vacating my seat at this important period in the session. The questions involved ought to be decided by the House, before they *adjourn*—it is a clear and palpable duty to settle these mooted points at *once and forever*—and I should be happy, *individually*, (if the resolutions were so framed as to settle them,) that I had been the occasion of their final decision; but as the *representative* of the people of Wake county, I feel bound to protest against their decison *now*. Sir, I would *as an individual* be unwilling to take this position before the House, but I am here, the voice of more than sixteen hundred freemen of the county of Wake; I pledged myself to my constituency that I would, upon this floor, be *faithful to them*, and so help me God, I will redeem that pledge, at all hazards, and at any sacrifice of my personal feelings. No man can surpass me, in respect for the opinions of those great men, many of whom now sleep in their graves, who succeeded in amending our Constitution in 1835–'6; no man here has more reverance for those *great* spirits who have since,

> "Gone down like suns,
> And left e'en on the mountain-tops of *death*,
> A light that made them lovely."

No man here is more zealous than I, to preserve perfect and intact, the *result* of their labors, which settled, as I hope for-

ever, a fraternal discord in our State which had marred our peace, and retarded our legislation for a quarter of a century. *And yet*, I say, the consideration of my right to my seat *ought not now* to proceed, but *that*, and all other questions of a like nature, should only be decided as *general* questions, or at least deferred until the end of this session; and so precedents be established for the government of future cases.

The course heretofore pursued by this House, it is, which has induced the people to believe, that persons holding such petty offices, as I now hold, are eligible to seats in this body.—*They knew* that this House was the sole judge of the qualifications and elections of its members; *they knew* that the question now before the House had been agitated here before, and that no man lost his seat because of holding such petty office; *they knew further*, that such officers had held seats in this body since 1836, at every session, without question or cavil; but, what knew such men, as my constituency are—plain, honest, common-sense men—of the difference, between a question being *directly* crushed by a negative vote, or being *strangled* by parliamentary management? And are my constituency—am I to suffer for the previous misconduct of this House?

Sir, some of the greatest tyrannies which have ever been perpetrated—which have stained the pages of history with blood—and made men in future ages blush for their kind—have been *based* upon *law*; but law which had *become obsolete*—law which was a dead letter—which was *revived* after slumbering for ages in the dust of oblivion for a *special* State occasion—to crush some enemy, or to build up some friend of those who revived it. It was by a revival of a disused statute of the time of Richard II., called the statute of provisors—that the bloated despot, Henry VIII, brought the great cardinal of England, then "towering in his pride of place," to 'er to his fall;" it was a *lawful* tyranny, which wrung that worn and heart-broken statesman in his memorable h-scene in Leicester abbey, that dying declaration, which t ring in the ears of the ungrateful monarch "at the crack doom." "I have come," says Wolsey, "to lay my bones amongst ye;" "had I but served God as diligently as I have

served the King, he would not have given me over in my gray hairs." It was by much the same means that the commons of Great Britain brought the illustrious Strafford to the block; "where," says he in his defence, against a species of treason which had been unknown or unheard of since the time of Edward III, "where has this fire been so long buried during so many centuries, that no smoke should appear, till it burst out to consume me and my children? Better it were to live under no law at all, and by the maxims of cautious prudence, to conform ourselves the best we can to the arbitrary will of a master, than fancy we have a law on which we can rely, and find at last that this law shall inflict a punishment precedent to the promulgation, and try us by maxims unheard of till the very moment of the prosecution. It is now full two hundred and fifty years since treasons were defined; and so long has it been since any man was touched to this extent upon this crime before myself. Let us not my Lords to our own destruction, awake those sleeping lions, by rattling up a company of old records which have lain, for so many ages by the wall. To my many afflictions add not this my Lords, the most severe of any—that I for my other sins, not for my treasons, be the means of introducing a precedent so pernicious, to the laws and liberties of my native country."

By such means was *he* "done to death," and fell, the victim to popular clamor, and a weak, ungrateful monarch; but his dying words still sound in our ears, "Put not your trust in Princes, nor in the sons of men, for in them there is no salvation." May we not learn wisdom from the tragic page of history to which they direct us? Does not the House see, that the tyranny towards my constituents and towards me, of thus suddenly reviving this dead letter in the Constitution, to exclude *me* from this House, differs but *in degree*, from the illustrious examples which I have cited? Will not my peers, amongst whom I now stand, see, what dangerous power, they are putting in the hands of any one member of this House, when they declare, that if a resolution is introduced by *any single member*, thus to revive against a particular individual, an unenforced provision of the Constitution, their consciences compel them to act at once *and at all risks*, to vindicate the

Constitution? Sir, as faithful representative,—as a lover of my State; as the opposer to the bitter end of a tyrannical *abuse of even lawful power;* aye sir, in defence of the chartered rights of humanity—*as a man*—I am *constrained* to raise my feeble voice against so dangerous a precedent.

And now, Mr. Speaker, I have done; if it be the pleasure of this House that I should relinquish my official connection with its members, I shall part from them with regret. I am not here of my own seeking; I had ever held the opinion that it was the duty of *every* citizen, when called upon, and convinced that the State had need of him, to sacrifice his time, and labor and means for the commonwealth. I thought the time had come when I might be of some service; I was ready to render it. I thought that I perceived before my election; I think I have seen in my short experience here, a spirit of radicalism abroad in our State,—a desire constantly to drag down our fundamental law into the dirty arena of party politics; a determination to make our Constitution a shuttle-cock for the amusement of political demagogues; and I, who am charged with a wilful violation of that Constitution—convinced that the conservative people of my county, and of my State desired and contemplated no such result; that they had an old fashioned respect for their organic law—was *eager*, to give my feeble arm to *aid* in shielding *it*, from the attacks of selfish politicians, intent upon their own aggrandizement.

I thought that I saw in the present financial condition of our State, *coming events, casting their dark shadows before them*, which might at last involve in their gloomy shade, the honor, faith and integrity of my dear old State; and I feared that, now—when North-Carolina was ridding herself of the reproach of barrenness, and opening her fruitful womb, to give birth to her rich and varied resources,—I saw in some scheming politicians, an inclination, for their own temporary success, to stab their mother, in the struggling pangs of child-birth.

I regret that I cannot be here to take an humble part in the great battle, which must be fought against such enemies of our State, but I bear with me, the consolation that I shall leave here, *many* arms stronger than mine to strike in her be-

half; and Wake county—while she can find none more faithful—has, thank God, many worthier sons than I; many better able to occupy the seat which I now hold.

I shall part too, with regret from many of the members of this body, with whom my social and official relations have been more than agreeable; and whatever course the House may pursue, I can never forget, the manly courtesy which has almost universally been extended to me, by members of this body, in my somewhat embarrassing position; and the kind, the respectful, the complimentary attention, which they have one, and all given me, throughout the extended time, I have occupied the floor.

Note.—An effort has been made herein, to consolidate, all the argument made by the author, in his several addresses to the House, in one speech; following as nearly as possible—without previous notes—the course of argument pursued by him, and omitting such parts of his remarks, as to him, now seem unnecessary to the argument, and better omitted.

APPENDIX.

(A.)

Resolution introduced by Mr. Waddill, of Stanly, on Saturday, November 20th, 1858 :

"*Resolved*, That the Committee on Privileges and Elections be requested to inquire into the rights of members to a seat in this House, who are acting as Clerks and Masters in Equity."

(B.)

Resolution introduced by Mr. Waddill, of Stanly, on Monday, November 22nd, 1858:

"*Resolaed*, That the Committee on Privileges and Elections be instructed to enquire whether E. G. Haywood, one of the members from Wake county in the House of Commons, holds the office of Clerk and Master in the Court of Equity, and if so, whether he is entitled to a seat in the House of Commons. That they further enquire if J. I. Scales, from Alamance county, had his residence in said county twelve months immediately before his election, and if not, whether he is entitled to a seat in this House. That they further enquire whether S. E. Williams, of Caswell county, had his residence in said county twelve months immediately before his election, and if not, whether he is entitled to a seat in this House. That they further enquire if Mr. Moore, of Martin county, is twenty-one years of age, and if not, whether he is entitled to a seat in this House. And further, that said Committee be authorized to send for persons and papers."

On motion of Mr. Dortch, of Wayne :

"*Resolved*, That the Committee on Privileges and Elections be instructed to enquire into and report the facts in relation to the several contested seats of members which have been, or may be, referred to them."

(C.)

Report submitted by Mr. Benbury, of Tyrrell, on the 1st of December, 1858, from the Committee on Privileges and Elections, as far as the same refers to Mr. Haywood's case:

"The Committee on Privileges and Elections have had under consideration the several cases that have been referred to them, and beg leave to Report:

The case of E. G. Haywood, one of the sitting members of this House, from Wake county, they have examined; and report, that E. G. Haywood was, at the time of his election, and is now, Clerk and Master of the Court of Equity for Wake county.

JOHN A. BENBURY, *Chairman.*"

(D.)

Resolutions introduced by Mr. Benbury, of Tyrrell, December 1st, 1858, upon which Mr. Haywood's remarks of the 6th and 7th of December, 1858, were predicated:

"WHEREAS, The 30th section of the constitution declares, that "no clerk of a court of record" shall have a seat in the House of Commons."

"And whereas, Section 4th of the 4th Article of the amendments to the constitution declares, "That no person who holds any office or place of rust or profit, under the United States, or any department thereof, or under this State, or under any other State or government, shall hold or exercise any other office or place of trust or profit, under the authority of this State, or be eligible to a seat in either House of the General Assembly."

"And whereas, E. G. Haywood, one of the sitting members of this House, for Wake county, is constitutionally disqualified to hold said seat."

Resolved, That the seat now held by E. G. Haywood in the House of Commons, is hereby declared vacant.

Resolved, That the Speaker of the House of Commons be instructed to issue his writ of election to supply said vacant seat."